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DAMAGES FOR DELAY IN TRANSMITTING MESSAGES.

In *Lucas v. Western Union Telegraph Company* decided in the Iowa Court of Appeals and reported in 109 N. W. 191, the defendant was sued to recover profits claimed to have been lost in a real estate transaction because of defendant's negligence in failing to deliver a telegram. Although the court does not hold directly that such profits might be recovered, certainly its opinion permits of such an inference. The question is not a new one and has been decided frequently before, but unfortunately, the decisions are not harmonious.

As to the amount of damages recoverable in general for the breach of a contract, the rule is that the offending party shall be liable only for such damages as the parties may be supposed to have contemplated would follow its violation. *Leonard v. New York, Buffalo and Albany Telegraph Company,* 41 N. Y. 544; *Curtin v. Western Union Telegraph Company,* 36 N. Y. Supp. 111. This general rule is well recognized, but in its application to damages in these cases the courts have found difficulty. While telegraph companies and common carriers are analogous in some respects it is generally held that the former are not absolute insurers of the proper transmissions of a message. *N. Y. and W. Printing Telegraph Company v. Dryburg,* 35 Pa. 398, as to whether their liability is or is not that of a common carrier it is important to decide. If telegraph companies are to be considered as common carriers, their liability is that of an insurer, and logically, they should be required to make full indemnity for actual loss sustained. In the case of

Parkes v. The Alta Cal. Telegraph Company, 13 Cal. 422, decided about 1860, the defendant was held liable for damages resulting from the loss of an attachment because of its failure to deliver a message promptly. The court in this case expressly held the telegraph company to be a common carrier. On the other hand, the case of *De Rutte v. The N. Y. and Albany and Buffalo Telegraph Company,* 1 Daly 547, decided about 1866, held that telegraph companies are not common carriers, but they should be held to a stricter accountability than mere bailees, and any delay or error should be presumed to have been due to their negligence.

In the principal case, the Court of Appeals in an opinion by Ladd, Judge, says: "If because of unreasonable delay in the acceptance, the contract was not completed, then it was for the jury to say whether the defendant was negligent in transmitting the message, and owing to this plaintiff lost the benefit of entering into the contract." The inference is, the defendant is liable for the amount lost in the transaction if the jury finds that it resulted from the negligence of the defendant company. It is this rule of damages, we think, as apparently laid down in the opinion that is open to criticism. The tendency of the courts at present seems to limit the liability of the telegraph company to the cost of the message unless the message itself may be presumed to fairly appraise the company of its importance and the damages which might ensue from their failure to deliver accurately and promptly. For failure to deliver a cipher message correctly the authorities are almost universal in holding that nominal damages only may be recovered, because such message does not appraise the company of its importance, so we think the rule would be the same in the case of any message which do not inform the defendant of the nature of the transaction involved. There are many cases holding this application of the rule of damages as the correct one. *Primrose v. The Western Union Telegraph Co.,* 154 U. S. 1; *Western Union Telegraph Co. v. Coggin,* 68 Fed. 137; *Candee v. Western Union Telegraph Co.,* 34 Wis. 471; *Merrill v. Western Union Telegraph Co.,* 78 Maine, 97.

With the rule of damages allowing such as may have been reasonably contemplated by the parties from a breach of their contract, it seems with all deference to the Ohio Court of Appeals, that the question to be submitted to the jury is, whether or not the telegram sent could be presumed to fairly appraise the company of its significance and the damage that a non-delivery would cause. A telegraph company could not reasonably be supposed to render itself liable for large damages at the ordinary rate of transmission especially when they have no knowledge of what would be the result of their failure to deliver. It is conceded that a telegraph company in all cases may defend their failure to deliver because of an act of God and may avail themselves of such defenses as common carriers have. True, there are many cases in accord with the view laid down by the Ohio courts. But it is plain that this application of the rule carried to its logical extreme, must necessarily work great injustice to the telegraph companies and render them liable to amounts far beyond what their rates of transmission would warrant.